Nos. 78-575, 78-597, 78-604

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-575
SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

No. 78-597
INTERSTATE COMMERCE COMMISSION,
Petitioner,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

No. 78-604
SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,
Petitioners,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS BOARD OF TRADE OF THE CITY OF CHICAGO, FS SERVICES, INC., ILLINOIS FARM BUREAU, ILLINOIS GRAIN CORPORATION AND ST. LOUIS GRAIN CORPORATION

HAROLD E. SPENCER
THOMAS F. McFARLAND, JR.
RICHARD S. M. EMRICH III
20 North Wacker Drive
Chicago, Illinois 60606
Attorneys for above-named Respondents

BELNAP, McCARTHY, SPENCER,
SWEENEY & HARKAWAY
Of Counsel

March, 1979

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

TABLE OF CONTENTS

CITATIONS

Cases

Statutes

Miscellaneous

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-575
SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

No. 78-597
INTERSTATE COMMERCE COMMISSION,
Petitioner,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

No. 78-604
SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,
Petitioners,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS BOARD OF TRADE OF THE CITY OF CHICAGO, FS SERVICES, INC., ILLINOIS FARM BUREAU, ILLINOIS GRAIN CORPORATION AND ST. LOUIS GRAIN CORPORATION

This brief is filed on behalf of respondents Board of Trade of the City of Chicago, FS Services, Inc., Illinois Farm Bureau, Illinois Grain Corporation, and St. Louis Grain Corporation, who were petitioners below in No. 77-1770 (8th Cir.).

STATUTES INVOLVED

In Appendix A are set out, in pertinent part, the provisions of the Interstate Commerce Act involved in this case as they were worded in 1977 at the time of the Commission's action, 49 U.S.C. §§ 2, 3(1), 4(1), 12, 15(8), 15(15) and 15(17). These provisions were recodified in 1978 without substantive change. All statutory references in this brief are to the Act as it existed in 1977.

QUESTIONS PRESENTED

1. Were the tariffs the railroads filed with the Commission so obviously unlawful that no investigation was necessary to determine that they should not be allowed to take effect?

2. If so, does the Commission overstep the bounds of its authority if it permits the tariffs to take effect in spite of protests which call the obvious unlawfulness to the Commission's attention?

3. If so, does a court of appeals have jurisdiction to review the Commission's refusal to suspend, investigate, or reject the tariffs?

STATEMENT

The tariffs here involved were filed with the Commission on behalf of the participating carriers on August 14, 1977, by the Southern Freight Association, a railroad freight bureau permitted under the Act to engage in collective ratemaking immune from the antitrust laws. The tariffs provided for a 20-percent increase in the rates on interstate, domestic and export rail shipments to, from, and within Southern Territory on twenty-nine different and separate grain commodities, but only when shipped in freight cars furnished by the railroads.[1] The increased

[1] Southern Territory lies generally east of the Mississippi River and south of the Ohio and Potomac Rivers. *Southern Freight Association-Agreements*, 283 I.C.C. 245, 246, n.1 (1951).

rates did not apply to shipments made in "private" cars (i.e., cars of non-railroad ownership which the shippers themselves owned or leased), although the rates in both types of equipment were precisely the same prior to the involved 20-percent increase. Shippers who ship in private equipment were and are compensated for furnishing such equipment by the payment to them by the railroads of mileage allowances (up to 18 cents per loaded mile) published in tariffs on file with the Commission pursuant to section 15(15) of the Act. The increases were seasonal in nature, being published to be effective from September 15 through December 15, 1977, a period stated to be a peak demand period within the scope of 49 U.S.C. § 15(17), a new provision which encouraged the publication of seasonal rates and instructed the Commission to facilitate them.[2]

At the time the tariffs were filed, the Commission had been the object of mounting criticism that it overregulated the railroad industry and discouraged innovative ratemaking by the railroads. The 4-R Act itself was a result of that criticism and its Title II, "Railroad Rates," constituted an effort to give the railroads new ratemaking flexibility. Section 202(d) directed the Commission to establish "standards and expeditious procedures" for demand-sensitive rates designed to promote leveling of traffic peaks and valleys, generate additional railroad revenues, and improve railroad car supply, railroad employment, and the financial stability of markets served by railroads. It also directed the Commission to report annually to Congress on the implementation of these rates. So earnest was the Commission's intent to carry out the Congressional directive that, in its notice instituting the rulemaking pro-

[2] Section 15(17) was added to the Act by § 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31 (4-R Act).

ceeding to establish such standards and procedures, the Commission pledged to—

> encourage the publication of seasonal, regional, and peak-period rates for rail service by removing any impediments to their publication and establishing a regulatory climate conducive to experimentation in railroad ratemaking.[3]

Procedures for expediting and facilitating seasonal rates were adopted by the Commission on February 4, 1977, and were modified by a subsequent order entered July 14, 1977.[4]

The tariffs here involved were only the third application filed with the Commission under section 202(d) for peak, seasonal or regional rates, and they were the first which proposed to increase rates during the peak season rather than reduce rates in the off season. They were also the first involving more than one railroad over a wide geographic area.[5]

From the Commission's standpoint, the proposal was suited for studying the implementation of this method of rail rate pricing, something it needed to do to be able to meet its § 15(17) obligation to report to Congress and recommend further legislation. In its report to Congress on the 4-R Act (see note 5, *supra*), the Commission had observed that while Southern Territory had a far lower percentage of seasonal traffic than other territories "the agricultural commodities constitute the major portion of peak and seasonal volume." (pp. 72-73) The proposal of the southern carriers included both high-revenue (wheat)

[3] ICC Docket Ex Parte No. 324, Notice of Proposed Rulemaking and Order, served June 10, 1976, 41 F.R. 24192.

[4] 42 F.R. 9022, 39390.

[5] The Impact of the 4-R Act Railroad Ratemaking Provisions, a report to Congress as directed by section 202, Interstate Commerce Commission, October 5, 1977, pages 93-94.

and low-revenue (corn and soybeans) agricultural commodities (p. 75), enabling the Commission to study the effect of a peak-period increase in each situation. The effects of truck competition were to be largely neutralized by the wide area covered by the tariffs and their application to all railroads within that area (p. 76), and since the Commission had a reasonably good idea of normal storage costs for grains, it could assess the relationship between the seasonal rate premium and the elasticity of demand for transportation.

It is readily apparent that the Commission, under fire, was eager to implement the 4-R Act's ratemaking provisions. It was, however, faced with the problem of the reluctance of the railroads to make use of the new ratemaking freedoms. It later noted:

> Although major provisions of section 202 have been in effect since October, 1976 (for the market dominance rules) and February 4, 1977 (for other rulemakings), use by railroads of these provisions has been limited . . . [M]ost railroads have shown only minimal interest in experimenting with the new provisions. In fact, the railroads as a group—with a few notable exceptions —have not even developed "test" cases through which the rules can be assessed. While the Commission's proceedings are for the most part open-ended, further refinement of the standards and guidelines may be slowed by the absence of practical experience. Also, where cooperation is a prerequisite, the railroad industry may not have the necessary cohesiveness to act together.[6]

It urged the railroads to "make a concerted effort" to use the experimental ratemaking provisions of section 202.[7]

Of all the provisions of section 202, those in subparagraph (d) relating to peak, seasonal and regional rates—

[6] "The Impact of the 4-R Act Railroad Ratemaking Provisions," Interstate Commerce Commission, October 5, 1977, pages 125-126.

[7] *Id.* at 127.

the type involved in this case—were regarded by the Commission as the most promising. The specific rate proposal here involved had been filed too late for analysis by the Commission in its study, but the Commission said:

> Peak, seasonal, and regional rate provisions may offer the largest potential benefits as carriers begin rate experiments under them. In fact, subsequent to the cutoff date for this study, the Southern Freight Association proposed a major seasonal rate on grain. The proposal would establish a 20-percent premium on grain originating in the Southern Territory from September 15, 1977 through December 15, 1977. If authorized, this may be the most significant change in grain rates since the establishment of the now famous Big John rates of the early 1960's.[8]

Respondents' charges of unlawfulness were that the tariffs, by increasing seasonal rates only on shipments in railroad-owned cars and not on similar shipments in private cars, unlawfully discriminated against shippers which did not have shipper-owned or leased equipment available to them (A. 144, 149, 156, 159, 160, 164, 165, 167, 168, 169, 173) and produced unauthorized violations of the long-and-short-haul clause of 49 U.S.C. section 4(1) (A. 144, 156, 159). Certain respondents requested rejection of the tariffs by the Commission, principally on section 4(1) grounds (A. 242-248).

On September 14, 1977, the Commission allowed the proposed tariffs to become effective and refused to investigate their lawfulness in spite of respondents' protests that, notwithstanding section 202(d), the tariffs were unlawful on their face, (A. 284-285, 286-291).

---

[8] *Id.* at page 123. Quite clearly, in permitting the involved tariffs to become effective, the Commission was not exercising its traditional role under section 15(8) of assessing the lawfulness of proposed rates, but was attempting to encourage innovative ratemaking without giving the slightest consideration to the traditional statutory tests of lawfulness.

Respondents, on September 14, 1977, filed petitions in the Court of Appeals for the Eighth Circuit for review of the actions and order of the Commission and obtained a temporary stay of the order (A. 295). The stay was dissolved on September 22, even though the court felt a strong showing had been made that the tariffs were patently illegal, and that the Commission's action in refusing to suspend or investigate them was outside the protection of the rule of *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963) (A. 298-300). The court, however, ordered the railroads to keep account of all amounts collected pursuant to these tariffs (A. 300).

The issues of patent illegality were thoroughly briefed and argued to the court below, which remanded the matter to the Commission for investigation, and for refund if the tariffs were in fact found unlawful (A. 303-316). In ruling that it had jurisdiction to review the Commission's action, the court did not find the tariffs were patently unlawful, but instead simply held that substantial issues of unlawfulness under sections 2, 3(1) and 4(1) had been raised, creating a duty to investigate (A. 315), and that the Commission's action in refusing to do so was reviewable.

In the court below respondents argued, as we here argue, that an agency charged with enforcement of the law has no discretion to permit a patently unlawful tariff to take effect. There, as here, the Commission and the petitioning railroads argued that suspension and investigation decisions are unreviewable under any circumstances. The holding of the court below however, was based on the arguments and representations of the United States, which told the court that the Court of Appeals for the District of Columbia had been wrong in ruling in *Asphalt Roofing Mfgrs. Assoc.* v. *Interstate Commerce Commission,* 567 F.2d 994 (1977), that investigation orders are not different from suspension orders for purposes of review. The United

States, however, told the court below that a refusal to institute an investigation is not immune from *immediate* review, saying:

> [W]e submit that the purposes of judicial and administrative efficiency are best served by permitting review of the section 15(8) issues following the Commission's decision not to investigate, rather than following subsequent section 13(1) proceedings.[9]

The court below so held.

Having sought and obtained this ruling, however, the United States reversed its position and sought a writ of certiorari in this Court on the ground that a decision not to open a section 15(8) investigation leaves aggrieved parties a section 13(1) remedy which is fully adequate. While the burden of proof shifts to the shipper under section 13(1), the United States concluded that this effect is not reviewable until and unless it results in an adverse decision in the section 13(1) case. The United States also concluded that the shifting of the burden of proof is the only significant effect of a refusal by the Commission to investigate (Memorandum For the United States, page 10). Thus, its new position is:

> The court of appeals is wrong to the extent that it held that the case is ripe for review as soon as the Commission declines to open an investigation (*Id.* at 6).

And, in its brief, it says (p. 14):

> Although the scheme of the Interstate Commerce Act does not suggest a congressional intent to insulate the Commission's decision not to investigate under section 15(8)(a) entirely from judicial review, we believe that the court of appeals was incorrect in holding that decision is immediately reviewable.

[9] Brief for the United States to the Court of Appeals for the Eighth Circuit in Seaboard Allied Milling Corp. v. Interstate Commerce Commission, Docket Nos. 77-1729 and 77-1770, page 18.

ARGUMENT

I.

The Involved Tariffs, Which Provide For A Lower Rate For Shipments In Private Cars Than For Similar Shipments In Railroad-Owned Cars, Violate Sections 2 and 3(1) Of The Interstate Commerce Act And Section 1 Of The Elkins Act As A Matter Of Law.

Prior to the 20-percent increase the rates on the involved grains and products were the same whether the shipments moved in railroad-owned or private cars. Shippers who shipped in private cars were compensated for the use of such equipment by the payment of a mileage allowance of up to 18 cents per loaded mile, as provided in tariffs on file with the Commission, as prescribed in section 15 (15) of the Act.[10] The tariffs here involved made no change in the rates on shipments in private cars but increased the rates on shipments in railroad-owned cars by 20 percent. There is no dispute on this point. All parties concede this is so.

The unlawfulness of the tariffs was obvious at the time they were filed with the Commission, and no investigation or determination of additional facts was necessary to a conclusive finding by the Commission to that effect. On their face they violated sections 2 and 3(1) of the Interstate Commerce Act, and section 1 of the Elkins Act. Contrary to the argument of the Commission to this Court, the patent unlawfulness was no mere "label."[11] It was so plain that the Commission had no need to rely on a "hunch."[12] The Commission's argument that it was un-

[10] Prior to the 4-R Act, this was section 15(13).

[11] Brief of ICC, page 48.

[12] *Id.* at 59.

able to find the lawfulness due to scanty evidence and summary pleadings is incorrect.[13] It had before it the only evidence necessary to make the determination, and the unlawfulness was clearly and repeatedly charged in the protests filed with the Commission (A. 144, 149, 156, 159, 160, 164, 165, 167, 168, 169, 173). It was an unlawfulness that is settled and in no way depended on further evidence, interpretation, or argument.

Sections 2 and 3(1) of the Act require railroads to frame their tariffs in such a manner as to make certain that similarly situated shippers are charged the same rates for similar shipments. The Elkins Act attaches criminal sanctions to the offering or granting of rate or other concessions, advantages, or discriminations by carriers and the solicitation or receipt thereof by shippers.

While a shipper has no absolute right to furnish private cars for the movement of its freight, and a railroad may insist on moving the freight in railroad-owned equipment, the use of shipper-owned cars, at the railroads' discretion, is permitted and lawful. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 428, 429 (1940). When a shipper tenders, and a railroad accepts, a shipment in a private car, the shipper is entitled under section 15(15) of the Act to be paid a just and reasonable allowance by the carrier for the use of the car. *El Dorado Oil Works* v. *United States*, 328 U.S. 12, 17 (1946). The allowances made for the use of private cars must be published in tariffs, must be uniform, and must, in the light of past and present experience, fairly and reasonably cover the cost of ownership of the equipment. *General American Tank Car Corp.*, v. *El Dorado Terminal Co.*, 308 U.S. 422, 430 (1940), *supra*.

[13] *Id.* at 61.

The shipper who furnishes a private car for the transportation of his freight, furnishes not freight, but an instrumentality of transportation, and his compensation for doing so is the uniform allowance provided in the carriers' tariff. It has therefore long been recognized that the contract between carrier and shipper by which the shipper furnishes and the carrier uses the private car in lieu of the railroad car is a thing altogether apart from the carrier's undertaking to transport the shipper's freight. *Assigned Cars for Bituminous Coal Mines*, 80 I.C.C. 520, 557 (1923). The allowance received by the shipper for use of the private car is required and is for the purpose of compensating the shipper for furnishing the car. The exact tariff amount is designed to reflect an average cost of ownership. *Sioux City Terminal Ry. Switching*, 241 I.C.C. 53, 65-66 (1940).

Because the furnishing of the private car is separately compensated and is a thing apart from the furnishing of the transportation, the private car shipper and the railroad car shipper may not be treated differently by the carrier with regard to the freight rate, and railroads may not, as here they did, publish different rates for shipments in private cars than for similar shipments in railroad owned cars. The Commission has so held from its earliest days. In 1888, the year after it was founded, it said in *Scofield* v. *Lake Shore & Michigan Southern R.R.*, 2 I.C.C. 90, at 115:

> The rule upon this subject, to which we have uniformly and steadily adhered, has been that the rate charged by the carrier must not be affected by either one of these customs and usages [i.e., renting cars from other railroads or renting cars from shippers for the transportation of their own goods], but must be the same on all cars operated over its line, whether furnished by the carrier or by others, just as though no custom or usage existed whereby the carrier obtained

> any of its cars from shippers or from car companies. The rate of three fourths of one cent per mile paid for the exchange of cars has seemed to us, upon evidence repeatedly taken upon this subject, a reasonable allowance for the car's service, and has been the same very generally in all parts of the country. We have decided in other cases, as we do now in this proceeding, that the carrier at its peril must see to it in every transaction in which the shipper furnishes the car for the transportation of his freight that such shipper shall not thereby receive a lower rate than other shippers who use and have to use the cars furnished by the carrier in the shipment of their freight.

Again, in *Rice, Robinson and Witherop* v. *Western New York & P. R. Co.*, 4 I.C.C. 131, 139 (1890), the Commission cited prior decisions to the same effect:

> [I]t is very certain and very obvious that proprietorship of the car for the use of which the carrier pays, as it generally does, can fairly entitle the owner to no special consideration in the making of rates. (1 Inters. Com. Rep. 740, 1 I.C.C. Rep. 548)
>
> Again: We hold, therefore, that the fact that one consignor furnishes a car for hire to the railroad company for the transportation of his oil is no ground whatever for a discrimination in rates in his favor against another consignor who must ship in the cars the carrier supplies. (1 Inters. Com. Rep. 741, 1 I.C.C. Rep. 549)

In *Assigned Cars for Bituminous Coal Mines*, 80 I.C.C. 520 (1923), it said, speaking through one of its most distinguished Commissioners, Clyde B. Aitchison, at page 557:

> Throughout our reports we have held to the central idea that the carrier, in permitting the use of the private car, must at its peril see that the use of the vehicle does not permit, excuse, or justify a discrimination, preference, or advantage in favor of the owner of the private car, regardless of the present ability of the carrier to furnish on demand an adequate supply of equipment needed for transportation.

The next year, in its report on further hearing in the same case, 93 I.C.C. 701, 718 (1924), Commissioner Aitchison amplified the rule in the following terms:

> . . . In passing upon the rule before us, it is important to bear in mind the fundamental purpose of the act "to compel the carrier as a public agent to give equal terms to all," "to cut up by the roots every form of discrimination, favoritism, and inequality," and to "place all shippers upon equal terms." *New Haven R.R.* v. *Interstate Com. Com.*, 200 U.S. 361; *Louisville & Nashville R.R.* v. *Mottley*, 219 U.S. 467; *United States* v. *Union Stock Yard*, 226 U.S. 286.

And at page 729, he quoted from the decision in *Chicago & Alton R. Co.* v. *Interstate Commerce Commission*, 173 Fed. 930, 932, where the court said:

> A shipper who owns cars is not entitled on that account, or on any account, to a preference in rates . . .

The decision in *Assigned Cars* was ultimately affirmed by this Court. *United States* v. *Berwind-White Coal Mining Co.*, 274 U.S. 564 (1927).

The Commission has had to face this same problem in connection with the permissible level of allowances by carriers for such equipment. In 1934, in *Use of Privately Owned Refrigerator Cars*, 201 I.C.C. 323, it said, at 378:

> A shipper, on the other hand, who owns no cars, but leases or otherwise obtains cars through a car line, whether privately owned or railroad controlled, under terms which place him in a more favorable position respecting the question of transportation than that prescribed by the published tariffs and occupied by shippers generally, is receiving an unlawful concession in violation of the Elkins Act. In *Interstate Com-*

merce Commission v. *Reichman,* 145 Fed. 234, the controversy involved our power to require a witness to answer a question relative to the payment of part of the car company's mileage earnings to shippers. The Court said:

> The purpose of the enactment of the statutes relating to interstate commerce was to give to all shippers of property uniform treatment in the matter of transportation, and the Interstate Commerce Commission was created to secure the enforcement of those statutes. . . .
>
> That law sought to establish a condition of absolute uniformity throughout the domain of interstate transportation to the end that no man having freight to ship would be charged more than anybody else would have to pay.

This case was cited as controlling in *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U.S. 422, 428, *supra,* in which the Commission itself intervened to make two arguments, one of which was that a prohibited rebate would result if the shipper furnishing a leased private car received in compensation therefor an amount in excess of its rental.

Its position there and in the other decisions quoted above is in sharp contrast to its casual reference to the problem of unlawful discrimination in the unusual general session order of the full Commission denying the petitions to suspend and investigate the increased rates. (A. 288). It there dismissed the argument of unlawful discrimination by saying: "The Commission has long recognized the justification for disparate treatment of private equipment, . . ." citing as authority its decision in *Switching at St. Louis and East St. Louis,* 120 I.C.C. 216, 221 (1926). That case not only lends no support to the Commission's statement; it stands in the mainstream of the other cited cases,

for the very position these respondents were asserting—that a rate differential based on car ownership is unlawful. In that case the Commission held at 120 I.C.C. 221, 222:

> . . . [I]f shippers in their own interest are permitted by the carrier to use their own equipment they cannot reasonably expect us to require the carrier to compensate them by a differential in the freight rate . . . [O]ur view is that the compensation to the car owner should be made through a rental charge rather than through a differential in freight rate.

The rationale offered by the carriers for this discriminatory feature of its tariffs was also off-hand. No explanation at all is offered in their justification statement (A. 25-96) but in their reply to the protests they said (A. 259) that the 20-percent increase in the rates was made applicable only to shipments in railroad-owned cars as "the result of compromise among the carriers which have different expectations of the role that private cars will, and should, play." This and the remainder of their discussion (A. 258-260), which stresses the experimental nature of the demand-sensitive ratemaking technique, is unabashed double talk and makes no pretense whatever of responding to the shippers' protests that the resulting rate differential violated the law. Neither the railroads nor the Commission has argued, either to this court or to the court below, that the tariffs were not plainly violative of sections 2 and 3(1) of the Act and of section 1 of the Elkins Act. We submit that such violations were and are clearly established as a matter of law.

II.

The Commission's Decision To Permit Plainly Unlawful Tariffs To Take Effect Is Reviewable

No action of the Commission can be totally immune from judicial review, and no action of the Commission is immune from judicial review simply because it occurs at the so-called suspension stage of proceedings. It is the character of the action that determines whether it is subject to judicial review. Petitioners attempt to force every case into the mold of *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), but this case does not fit the mold.

It is now clear that a Commission decision to suspend and investigate a rate is not immune from judicial review where the issue raised is whether the Commission has overstepped the bounds of its authority. *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 638, n.17 (1978). The same rationale for judicial review exists here as in *Trans Alaska.* The Commission oversteps the bounds of its authority in permitting a plainly unlawful tariff to take effect.[14]

Section 12 of the Interstate Commerce Act authorizes and requires the Commission "to execute and enforce the provisions of this part." No agency so empowered and so charged acts within the bounds of its authority when it

[14] Before the court below and in this court, the petitioners have studiously avoided any discussion of the merits of respondents' contention that the tariffs are plainly unlawful. Instead, substantially all of their arguments are directed toward an attempt to convince the Court that a decision for respondents would result in a flood of additional petitions for review of the Commission's non-exercise of its power of suspension. This is plainly not so. The occasions on which a litigant could reasonably contend that tariffs are unlawful on their face would be extremely limited. The "dire-consequences" arguments of petitioners simply have no place here.

permits, over strenuous objection, plainly unlawful tariffs to take effect.[15] The Commission is a creature of the law and not a law unto itself. Its regulatory power and its administrative discretion and experience cannot be invoked to support action outside the law. *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 487 F.2d 1143 (D.C. Cir. 1973).

In *Atchison, T. & S. F. Ry.* v. *Wichita Board of Trade,* 412 U.S. 800 (1973) this court cited *Oestereich* v. *Selective Service Bd.*, 393 U.S. 233 (1968) and *Fein* v. *Selective Service System,* 405 U.S. 365 (1972) as precedent for a distinction between procedural error and blatantly lawless action as bearing on the reviewability of otherwise unreviewable administrative action. These cases are especially significant because the statute there involved (the Military Selective Service Act of 1967, 50 U.S.C. Appx § 460(b)(3)), provides expressly that there shall be no pre-induction judicial review "of the classification or processing of any registrant," and specifically withdraws the power of judicial review from the courts at that stage of an induction proceeding. Section 15(8) of the Interstate Commerce Act, which empowers the Commission to suspend and investigate rates, to the contrary, contains no such express withdrawal of the power of judicial review over Commission action at the suspension stage. In *Oestereich* and *Fein* this court affirmed the position that even an express statutory withdrawal of an administrative action from the sphere of judicial interference does not operate to prevent a court

[15] The Commission normally uses its power of suspension to prevent any tariff from becoming effective for other than technical deficiencies, although the remedy of rejection would clearly be the more appropriate remedy in this situation. But whatever the means employed, the Commission does have a legal duty to prevent plainly unlawful tariffs from becoming effective.

from reviewing and setting aside agency action in excess of statutory limits or where the agency has engaged in blatantly lawless action.

Arrow Transportation Co. v. *Southern Ry. Co.*, 372 U.S. 658 (1963), and *United States* v. *SCRAP*, 412 U.S. 669 (1973), do not stand for the proposition that whenever the Commission issues an order on the subject of suspension or investigation no court may review the lawfulness of the order or of the tariffs involved. While some courts in certain factual circumstances have appeared to make such an assertion, the law is firmly established that while section 15(8) of the Act generally, and under most circumstances, entrusts to the discretion of the Commission the determination of whether suspension and investigation of a proposed tariff are warranted by probable unreasonableness, that discretion does not permit the Commission to close its eyes to patent unlawfulness and does not bar court review where the Commission does so.

The holding of *Arrow* is that, when the Commission's seven months' suspension period expires during the course of an investigation, a district court has no power, by injunction, to extend the suspension period further. In *SCRAP* the Court held that its ruling in *Arrow* could not be circumvented by the technicality of issuing an injunction against the Commission as well as against the railroads since such an injunction would constitute an intrusion into the Commission's primary jurisdiction over matters committed to its regulatory discretion. Neither *Arrow* nor *SCRAP* stands for the proposition that where a tariff or a suspension order is patently unlawful the courts have no power to review and set aside an order not to suspend or investigate it; nor would either case prohibit a court, in such circumstances, from ordering the tariff cancelled and the amounts lawfully collected to be refunded.

Rather, the holdings in those cases are addressed to circumstances in which the issue of the lawfulness of the tariffs remained for the Commission to decide since the unresolved issues of reasonableness raised were within the Commission's primary jurisdiction. As the Court said in *SCRAP:*

> But *Arrow* was grounded on the lack of power in the courts to grant any injunction *before the Commission had finally determined the lawfulness of the rates* . . . (Emphasis added.)[16]

To exactly the same effect, see the subsequent decision in *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289 (1975) at 298. And in *Arrow* itself the Court, referring to the question of a judicial injunction of a rate said that:

> Such a procedure would permit a single judge to pass *before final Commission action upon the question of reasonableness of a rate,* which the statute expressly entrusts only to a court . . . reviewing the Commission's completed task. (Emphasis added.)[17]

The *Arrow* and *SCRAP* decisions stand for the proposition that where the lawfulness of a proposed tariff is *in doubt* in an area entrusted to the Commission's primary jurisdiction (primarily questions of reasonableness), that doubt should be removed by the Commission, and until it has acted, the courts do not have power to determine whether the operation of the tariffs should be suspended. But where no doubt exists, and where no investigation by the Commission is necessary because the tariffs or rates are obviously unlawful on their face, the jurisdiction of the court to prohibit their collection or to order refund is not dependent upon the primary jurisdiction of the Commission.

---

[16] 412 U.S. at 691.

[17] 372 U.S. at 671.

The Commission here relies heavily on this Court's opinion in *Morris* v. *Gressette,* 432 U.S. 491 (1977), which held unreviewable the Attorney General's failure to interpose a timely objection, under section 5 of the Voting Rights Act of 1965, to a change in the voting laws of South Carolina. The case is distinguishable from the instant case in that the Attorney General is not charged with regulation of voting, and has discretion to select which cases to prosecute and which to leave to the parties' private remedies. The Commission has no such latitude or discretion. It is charged with enforcement of the provisions of the Interstate Commerce Act in a regulatory capacity, and it acts outside the scope of its powers and of the law when it refuses to prevent plainly unlawful tariffs from taking effect.

Petitioners and the United States all stress their view that the existence of a procedure for complaint by shippers under section 13(1) of the Act is significant. They argue that, since shippers may complain under section 13(1), the Commission's refusal to suspend and investigate under section 15(8)(a) is not an adjudication on the merits, but merely a preliminary screening, and that such action, not being final agency action, is unreviewable. They argue that shippers have an adequate administrative remedy which must be exhausted before a court can act. The United States argues, in addition, that the sole significant effect of the refusal to suspend or investigate is to shift the burden of proof to the shippers, and that the suspension and investigation decision is reviewable only if this effect brings about a negative result for the shipper in the section 13(1) complaint case.

Petitioners and the United States have failed to take several facts into account. The recitation by petitioners

of the step-by-step procedures followed under section 15(8)(a) of the Act and the need for shippers to exhaust all available procedures begs the question in this particular case. While it is true that protests were filed in the expectation that normal section 15(8)(a) procedures would be followed by the Commission, and protestants requested suspension and investigation as if they were addressing the Commission's Fourth Section and Suspension Board that normally handles such matters, the specific decision reviewed by the court below was not issued by an employee board within the context of the section 15(8)(a) procedures. Instead, the Commission itself took charge of the tariffs and issued its unanimous order, apart from its normal procedures, at a general session (A. 286). Nowhere in the Commission's order does it suggest that it is acting in the rapid-fire, surface-depth manner alleged by petitioners. Rather, it is clear that the Commission intended its order to suggest full Commission action and full Commission policy in implementing the new legislation. Otherwise it could simply have directed the employee board to allow the tariffs to take effect and not to begin an investigation.

In its decision to permit the rates to become effective, the full Commission, in general session, ruled that the "justification" for discrimination in rates on the basis of car ownership had been "long recognized" by the Commission and that "insufficient evidence is available to warrant suspension."[18] (A. 288-289) This holding was a ruling on the issue of patent lawfulness of the tariffs based on the only evidence relevant to the ruling, the tariffs themselves.

The court below correctly so held (A. 314). It was a ruling which, coming from a general session of the full

---

[18] See pp. 14-15, *supra.*

Commission, would reduce dramatically the incentive to shippers to seek a contrary finding from subordinate employees at the Commission in a later section 13(1) complaint case.

The practical question of the adequacy of the section 13(1) remedy has also not been sufficiently presented by petitioners to the court. The effect of a refusal to institute an investigation under section 15(8)(a) is not solely, as the United States argues, to shift the burden of proof to the shippers. The main effect is to alter the scope of the remedy. Under section 15(8)(a), a finding that the rates are unlawful will result in an order of refunds to all who have paid them pursuant to an accounting by the railroads. Thus, shippers with $50 and $150 claims are protected. In a section 13(1) complaint case, reparation is available only to those whose injury is sufficiently large to warrant the expense of filing a complaint, and even then, only to those who prove entitlement. Others cannot be awarded reparation. It is significant that in its order, the Commission required the railroads to keep records of the effect of the tariffs but did not order them to keep accounts for restitution purposes in the event of an ultimate finding of unlawfulness. (A. 289) The section 13(1) remedy is available only to shippers with large claims. It does not, even if successful, result in an order that protects all shippers. As a remedy therefore, it is neither adequate nor equivalent to the section 15(8)(a) remedy.

Furthermore, there is no way that a later complaint under section 13(1) can protect a shipper in railroad-owned cars who is forced out of competitive markets by the 20-percent rate advantage to his competitor who can ship in his own private cars. He cannot recover reparation for unreasonableness on shipments he does not make, and there is no way he can prove damages before the Commis-

sion for being forced out of his normal market even though he suffers substantial monetary losses as a direct and proximate cause of the discriminatory rate treatment.

The essential holding by the court below was that the Commission's refusal to investigate was reviewable because a substantial showing of unlawfulness had been made and investigation was therefore a duty. The specific findings of the court below and the stated rationale of its decision, to the extent that they deviate from the rationale for review permitted by this court's decisions, are the result of misleading arguments made to the court below by the United States.

Because the United States disagreed with the holding of the Court of Appeals for the District of Columbia Circuit that the reviewability of investigation orders is no different from reviewability of suspension orders, *Asphalt Roofing Manufacturers Association* v. *Interstate Commerce Commission*, 567 F.2d 994 (1977), *supra*, it urged the court below to reach a decision that would directly conflict with that holding. It therefore argued, incorrectly, that *any* review of a suspension decision is prohibited, but that "for purposes of judicial review, it is unreasonable to assume that Congress intended the Commission's power to investigate proposed rates to be a matter committed to the sole discretion of the agency."[19] The court accepted that argument (A. 310-311), quoting the brief of the United States, and proceeded to review only the Commission's refusal to investigate.[20] By the time the court rendered its decision, the tariffs had expired by their own terms, so any question of enjoining the tariffs was, at that time, moot.

---

[19] Brief of the United States below, pp. 8, 13.

[20] The court's statement (A. 310) that this also represented the view of protestants (respondents here) is erroneous. No respondent ever made any such contentions.

The United States argued below that the court should review the Commission's decision, but did not assert that the tariffs were in fact unlawful. The court below, following the theory of the United States, ruled that the Commission's duty to investigate arose because substantial *issues* of unlawfulness were presented, not because in permitting patently unlawful tariffs to become effective the Commission had overstepped the bounds of its authority.

The court below held the section 13(1) remedy inadequate on the incorrect ground that, in such cases the Commission has limited the scope of its inquiry to less than it will consider in the section 15(8)(a) setting (A. 312). Again, the language it used was taken from the brief of the United States, page 17. The true inadequacy of the section 13(1) remedy results from the limited scope of the protection it affords, as opposed to complete relief to all affected shippers under a section 15(8)(a) investigation.

The court below also referred imprecisely to the Commission's action as if it were the termination of an investigation that had been undertaken rather than a refusal to suspend and investigate. This, too, has its origin in the government's brief which urged that an investigation had taken place in fact although not in name. The United States told the court:

> [The Commission] would substitute reliance on labels for analysis of reality to insulate from review a decision based on consideration of extensive pleadings addressing myriad issues on the merits merely because the Commission had not yet invoked the formal designation of "investigation."[21]

These respondents submit that the question of the jurisdiction of the Court of Appeals to review the particular

[21] Brief of the United States below, pp. 18-19.

Commission action here involved is a question which is separate and distinct from any question concerning the correctness of the remedy which the Court below adopted.

The remedy selected by the court below was incorrect. Respondents argued below that the court should declare the tariffs unlawful on their face, set the Commission's action aside, and order the railroads to refund all amounts unlawfully collected. The court instead found only that, since substantial issues of unlawfulness had been raised, the Commission's error was in refusing to investigate, and remanded to the Commission with orders to investigate. This course was improper because the fact that made the Commission's action reviewable was that the Commission over-stepped the bounds of its authority in allowing obviously unlawful tariffs to take effect over protest. Its refusal to investigate was peripheral because of the *plain* unlawfulness of the tariffs. No investigation was necessary. Its refusal to suspend or reject the tariffs was, however, central. The error of the court below resulted from the erroneous argument of the United States that the refusal to suspend could not be reviewed by the court even if such a refusal, as in this instance, was beyond the Commission's powers.

Under well known rules of tariff interpretation, the Court of Appeals had full power to construe the tariffs. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922); *Great Northern Railway Company* v. *United States*, 352 F.2d 375, 376-77 (Ct. Claims, 1965); *Penn Central Company* v. *General Mills, Inc.*, 439 F.2d 1338, 1340 (8th Cir. 1971). The tariffs plainly provided that the increase of 20 percent applied only in railroad-owned cars. No one has disputed that fact. Respondents (petitioners below) did not rely on any issue of reasonableness within the

primary jurisdiction of the Commission. They did not seek any investigation by the Commission.

After all, what purpose could be served by a Commission investigation? Can it be contended that the Commission could somehow find, in direct contravention of its own abundant precedents, that the shipper in private cars can lawfully be given such a rate advantage over a competitor who is obliged to ship in railroad-owned cars? Certainly no petitioner, either in the court below or in this Court, has suggested any rationale on which such a finding could be made. And if the Commission did make such a finding, either the Court of Appeals or this Court would set it aside as a matter of law. Why then condemn the shippers to a long, useless investigation which can only have one ending?

While respondents believe it is a foregone conclusion that, if the Commission is forced to rule on the matter, it would hold the tariffs to be plainly unlawful, what is presented is a clear-cut question of law, and the Commission's conclusions on questions of law are not binding on the courts. *Chicago, M. St. P. & P. R. Co.* v. *Alouette Peat Products*, 253 F.2d 449, 454 (9th Cir. 1958); *Seaboard Airline Railroad Company* v. *United States*, 387 F.2d 651, 656 (Ct. Claims, 1967); *United States* v. *Missouri P. R. Co.*, 278 U.S. 269, 280 (1929).

Respondents submit that the Commission's action in permitting patently unlawful tariffs to become effective is judicially reviewable. The court below, however, should have entered a finding that the tariffs were unlawful as a matter of law and should have ordered the railroads to refund the charges collected under such unlawful tariffs.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment below insofar as it held the Commission's action to be subject to judicial review, but should modify the judgment to provide that the carriers should refund the excess charges collected under such unlawful tariffs.[22]

Respectfully submitted,

HAROLD E. SPENCER
THOMAS F. MCFARLAND, JR.
RICHARD S. M. EMRICH III
Attorneys for above-named Respondents

BELNAP, MCCARTHY, SPENCER,
SWEENEY & HARKAWAY
Of Counsel

[22] The carriers are subject to an accounting order entered by the court below (A. 300).

APPENDIX A

Statutes Involved

Interstate Commerce Act, as amended:

Section 2, 49 U.S.C. § 2 [49 U.S.C. § 10741(a)]:*

> That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 3(1) 49 U.S.C. § 3(1) [49 U.S.C. §10741(b)]:

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

---

* References in brackets are to the recodification of the Act, effective October 17, 1978.

Section 4(1), 49 U.S.C. § 4(1) [49 U.S.C. §10726]:

(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, ...

Section 12, 49 U.S.C. § 12 [49 U.S.C. §10321(a)]:

. . . The Commission is hereby authorized and required to execute and enforce the provisions of this part; . . . .

Section 13(1), 49 U.S.C. § 13(1) [49 U.S.C. § 11701]:

That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within

the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15(15), 49 U.S.C. § 15(15) [49 U.S.C. § 10747]:

If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

Section 15(17), 49 U.S.C. § 15(17) [49 U.S.C. § 10727]:

Within 1 year after February 5, 1976, the Commission shall establish, by rule, standards and expeditious procedures for the establishment of railroad rates based on seasonal, regional, or peak-period demand for rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments, through rescheduling and advance planning; (b) generate additional revenues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability

of markets served by railroads. Following the establishment of such standards and procedures, the Commission shall prepare and submit to the Congress annual reports on the implementation of such rates, including recommendations with respect to the need, if any, for additional legislation to facilitate the establishment of such demand-sensitive rates.

Elkins Act, as amended:

Section 1, 49 U.S.C. § 41(1) [49 U.S.C. § 11903]:

> . . . [I]t shall be unlawful for any person, persons, or corporation to offer, grant, or give, or so solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: . . . .